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IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1984

Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross,

Appellants

v.

Lana J. Scofield and A. Larry Berren, on behalf of themselves and all those similarly situated,

Appellees

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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18 pp

Question Presented for Review

Did the Supreme Judicial Court of Massachusetts err in holding constitutional a City of Boston Rent Control Regulation which prohibited the implementation of a city-wide increase of maximum rents when a lease failed to include an option permitting the tenant to terminate the lease.

List of all Parties

All parties appear in the caption of the case in the Court except that the Boston Rent Control Administration intervened in the case below.

TABLE OF CONTENTS

OPINION BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED 2
STATEMENT OF THE CASE 4
CONCLUSION 15

TABLE OF AUTHORITIES

CASES

American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, 374 Mass. 181 (1978) 13

Huard v. Forest Street Housing, 366 Mass. 203 (1974) 12,14

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, §10 2-3

STATUTES

28 U.S.C. §1257(2) 2

MISCELLANEOUS

City of Boston Ordinances of 1975, Chapter 15 . . . . . passim

Boston Rent Control Board, Regulation 11, Section 12 . . . passim

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JURISDICTIONAL STATEMENT

Opinion Below

The Supreme Judicial Court of Massachusetts issued its decision on

October 3, 1984. The decision is reported at 373 Mass. 95 and has been reprinted at pages 1 through 22 to the Appendix herewith.

Jurisdiction

The decision of the Supreme Judicial Court, upholding the constitutionality of the City of Boston Rent Control Regulation, is dated October 3, 1984.

A notice of appeal to this Court was duly filed in the Supreme Judicial Court of Massachusetts on October 31, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes Involved

U.S. CONST. art. I, §10.

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money;

emit Bills of Credit; make any Thing but gold and silver Coin a Tender of Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with any State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Boston Rent Control Board, Regulation 11, Section 12.

Section 12. Implementation.

A. Subject to the provisions of this Regulation the new maximum

> rent established by this Regulation may not be charged until the expiration of any lease or tenancy existing on the effective date of this Regulation, or unless the tenant is given the option of terminating the tenancy under a provision of the lease agreement.

Statement of the Case

Appellant, Berman & Sons, Inc., was at all times relevant hereto, the managing agent for the owners of the apartment buildings situated at 1800, 1810, 1820, 2045 Commonwealth Avenue, 66-70 and 90 Chiswick Road in the Brighton section of the City of Boston. The landlord was the lessor with respect to the leases signed by the members of the tenant class. Appellant, Martin S. Berman, is the President of Berman & Sons, Inc. Appellant, William Allen, was at all times material thereto the property manager for the landlord. Martin S. Berman and Lila Gross are the

general partners of Berman Central Realty, a Massachusetts Limited Partnership and owners of the aforementioned properties.

The properties occupied by the tenants were subject to Boston's Rent Control Ordinance, Chapter 15 of the Ordinances of the City of Boston. On or about November 24, 1976, pursuant to Chapter 15 of the Ordinances of the City of Boston, the Boston Rent Board granted a general adjustment of maximum rents for all rental housing in the City of Boston subject to rent control. On December 16, 1976, the Boston Rent Board promulgated Regulation 11 pursuant to Chapter 15 in order to carry out the general adjustment. Section 12(A) of Regulation 11 entitled, "Implementation", provides, in pertinent part that "... the new maximum rent established by this

Regulation may not be charged until the expiration of any lease or tenancy existing on the effective date of this Regulation, or unless the tenant is given the option of terminating the tenancy under a provision of the lease agreement."

Paragraph 33 of the form lease agreement then used by the landlord, entitled, "Rent Control", states that:

> Notwithstanding anything contained herein to the contrary:
>
> A. lessee shall pay only the maximum rent allowed under applicable rent control laws or other laws regulating rents.
>
> B. if during the term of this lease or any extension or renewal thereof, rent control laws or laws regulating rents remain in effect or become applicable to the demises premises, and the Lessor is authorized or permitted to increase the maximum rent for the demised premises, then the rent to be paid by the lessee hereunder, commencing with the effective date of such

> authorization or permission shall be the maximum rent or so authorized or permitted.

The tenants contend that the landlord's attempt to collect the general adjustment without a lease providing the tenant with the option of terminating the tenancy is a violation of Section 12(A) of Regulation 11. The landlord contends that Section 12(A) of Regulation 11 is both outside the scope of the powers of the Rent Board and in violation of the United States Constitution.

A class action complaint was filed with the Housing Court of the City of Boston on May 12, 1977. The First Amended Complaint was filed with the Housing Court of the City of Boston on October 13, 1977, adding a claim pursuant to the Massachusetts Consumer Protection Statute, adding William Allen as a defendant, and adding an individual claim

on behalf of one of the class members. The Second Amended Complaint was filed on April 10, 1978, adding Martin S. Berman and Lila Gross as party defendants.

On January 31, 1979, the tenants moved for partial summary judgment on the class action claim against only Berman & Sons, Inc., Martin S. Berman and Lila Gross pursuant to prayers 2, 3 and 3.1 of the prayers for relief contained in the Second Amended Complaint. Both parties submitted affidavits and extensive memoranda at which time Appellants raised the issue sought to be reviewed by this Court. The tenants' Motion for Partial Summary Judgement was decided without oral argument.

On November 14, 1980, the Housing Court of the City of Boston issued "Findings of Fact, Conclusions of Law and Order Relative to Plaintiffs' Motion For

Partial Summary Judgment Against Berman & Sons, Inc., Martin S. Berman and Lila Gross". In upholding the constitutionality of the Rent Board Regulation, in essence the Housing Court determined that the Appellants were not entitled to a rent increase unless authorized by the Rent Board and that the Rent Board never authorized the Appellants to increase the rent because the Rent Board required that any lease in which the rent was to be raised must permit the tenant to terminate. The Housing Court further determined that since there was such a public emergency in housing a private contract (lease) must yield to rational legislative protection of public interests.

After numerous post-judgment motions and a trial on one of the class member's individual claims, an Amended

Judgment was entered on May 13, 1982. Cross-appeals were then filed to the Supreme Judicial Court of Massachusetts on June 8 and 9, 1982. On appeal before the Supreme Judicial Court of Massachusetts Appellant raised the issue sought to be reviewed by this Court.

In its decision on October 3, 1984, the Supreme Judicial Court of Massachusetts affirmed the decision of the Housing Court of the City of Boston, determining that the lease provision was not inconsistent with the Regulation, which specified the time and circumstances under which a rent increase would be authorized. The Supreme Judicial Court of Massachusetts failed to comment on the threshhold argument made by Appellants in their brief.

The Question Is Substantial

While it has been well established that rights contained in a private contract must yield to rational legislative protection of the public interest, it is crucial that in promulgating and enforcing rent control legislation and regulations, that contractual obligations be steadfastly enforced so as to avoid intrusion of constitional rights not warranted by execution of police power. This is a situation where one agency charged with the responsibility of fixing lawful maximum rents went beyond the scope of its power with Section 12(A), the effect of which was to retroactively nullify a prior lease which indeed contained a rent control clause that failed to include only an option to terminate.

In this case, landlord and tenant agreed not only as to the rental rate at the time the lease was executed, but moreover, through Paragraph 33(b)--the rent control clause--the parties further contemplated the prospects of a future general adjustment of the maximum rent by the Boston Rent Board. To hold such a lease agreement retroactively null and void because it fails to include a specific clause that was not required or contemplated at the time the lease agreement was executed, is indeed a violation of Article I, Section 10 of the Constitution of the United States. To interfere with the agreement where both parties contemplated the very heart of Regulation 11 (a general adjustment of maximum rents) in their lease agreement is certainly not a "rational legislative protection of public interest". Huard v.

Forest Street Housing, Inc., 366 Mass. 203, 207 (1974).

The Supreme Judicial Court of Massachusetts failed to even determine whether the Regulation was "reasonable" and thus whether it was equitable to apply the retroactive statute against the Appellants. American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, 374 Mass. 181 (1978). Rather, it simply relied on the fact that the lease stated that a rent increase only be obtained when the landlord is "authorized or permitted" to increase the lawful maximum rent and that Section 12(A) specifically provided the time and circumstances under which a rent increase may be authorized. The Court simply avoided the issue of whether the Regulation was reasonable in view of the

existing lease which fully contemplated a general adjustment of the maximum rent.

There certainly existed no emergency in housing to justify the imposition of Section 12(A) where the tenants, by virtue of their contract (lease), clearly contemplated such an adjustment. For the same reason, it cannot be said that the tenants were either unwilling or unable to pay the increase. If the tenants were concerned that they would be required to pay an increased rent, they should not have entered into the contract. To interfere with a contract where both parties contemplated the very heart of Regulation 11 in their lease agreement is not a "rational legislative protection of public interest". Huard, supra, at 207.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

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